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BEFORE THE
SURFACE TRANSPORTATION BOARD

Section 5a Application No. 61 (Sub-No. 6)
National Classification Committee -- Agreement

Rebuttal Comments
in Regard to Board Request for Proposals and Comments
Decided February 4, 2000, Service Date February 11, 2000

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Dated: June 6, 2000

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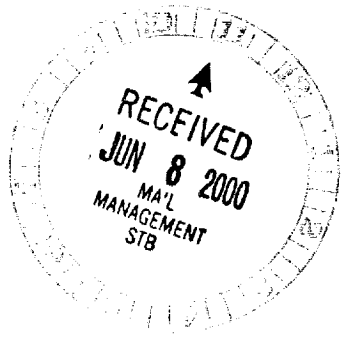
SURFACE TRANSPORTATION BOARD



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of the American Trucking Associations, Inc.
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Two errors of law were reflected in the Reply Comments of the National Industrial Transportation League (NITL) dated May 11, 2000, the joint Reply Comments of the National Small Shipments Traffic Conference, Inc. (NASSTRAC) and the Health and Personal Care Distribution Conference, Inc. (H&PCDC) dated May 11, 2000, and the Reply Comments of the Transportation Consumer Protection Council, Inc. (TCPC) dated May 11, 2000. The Reply Comments of all three misinterpret Section 13703 of Title 49 of the United States Code as if it permits the Surface Transportation Board ("STB" or "Board") to decide whether the National Classification Committee (NCC) Agreement merits antitrust immunity. The Reply Comments of the TCPC also fail to recognize that the law that will apply in the Board's decision in this proceeding is the text of Section 13703 as it is in force at the time of the Board's decision. The American Trucking Associations, Inc. (ATA) rebuts the Reply Comments of NITL, MASSTRAC & H&PCDC, and TCPC on these two issues.

I. The Board Cannot Add Its Own Antitrust Policy to the Applicable Statutory Standards

When Congress delegates authority by statute to an agency, such as the Surface Transportation Board, the agency must exercise the authority in conformity with the standards

for exercise of such authority set by Congress in the statute. *See* Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984); *see* Association of American Railroads v. Surface Transportation Board, 162 F. 3d 101 (D.C. Cir. 1998). Section 13703 of Title 49 of the United States Code sets forth plainly the standards for the Board to apply with regard to continuing the National Classification Committee (NCC) Agreement. If the Agreement meets those standards, the Board continues the Agreement and antitrust immunity automatically attaches by operation of law.

The Reply Comments of the NITL, NASSTRAC & H&PCDC, and TCPC argue that Section 13703 authorizes the Board to determine, in assessing the congruency of the Agreement and the public interest, whether the Agreement merits antitrust immunity. The NITL states (page 12) that "consideration by the Board as to whether the continuation of antitrust immunity for NCC activities is appropriate, is relevant to the public interest determination that the Board must make in deciding whether to renew the NCC Agreement." The NASSTRAC & H&PCDC state (page 3) that: "The Board's reference to granting immunity is simply shorthand for the statutory requirement of a finding that the NCC's agreement is in the public interest before immunity will attach." The TCPC states (page 3) that "the Board's determination that the public interest is best served by conditioning continued antitrust immunity for the NCC upon greater shipper participation in the classification process is well within the authority granted by the statute."[1] These statements misinterpret the law, which provides clear standards for the Board's exercise of authority with regard to the Agreement and which does not authorize the Board to judge the merits of granting antitrust immunity.

[1] The statute to which the TCPC quotation refers is former Section 13703(c) of Title 49 of the U.S. Code. That subsection has been amended by Section 227 of the Motor Carrier Safety Improvement Act of 1999 (Public Law 106-159, December 9, 1999)("MCSIA").

Section 13703(a) of Title 49 of the United States Code grants to the Board the authority regarding an agreement submitted under that section to find whether the "agreement is in the public interest" and to "require compliance with reasonable conditions . . . to assure that the agreement furthers the transportation policy set forth in section 13101." As is clear from the plain language of paragraph 13703(a)(6),[2] Congress has already made the decision in enacting paragraph 13703(a)(6) to confer antitrust immunity automatically when, in the case of an agreement first presented to the Board for approval, those two requirements -- public interest and reasonable conditions to further the statutory transportation policy -- are met. With regard to continuation of an agreement previously approved by the Board (such as the NCC Agreement), the statute provides a strong presumption in favor of continued renewal of that agreement. 49 U.S.C. §13703(c)(2).

The Board cannot add its own antitrust policy on top of the statutory standards. Congress has not given the Board authority or discretion to simply decide that the NCC Agreement does not merit antitrust immunity.

The Reply Comments of TCPC, NASSTRAC & H&PCDC, and NITL all reiterate that Congress granted to the Board in Section 13703 of Title 49 the power regarding the NCC Agreement to determine consistency with the public interest and to set reasonable conditions to further the national transportation policy.[3] Their restatement of what the statute says misses the

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[2] Section 13703(a)(6) of Title 49 states: "If the Board approves the agreement or renews approval of the agreement, it may be made and carried out under its terms and under the conditions required by the Board, and the antitrust laws, as defined in the first section of the Clayton Act (15 U.S.C. 12), do not apply to parties and other persons with respect to making or carrying out the agreement."

[3] TCPC Reply Comments at 3, NASSTRAC/H&PCDC Reply Comments at 2-3, and NITL Reply Comments at 10-11. The TCPC Reply Comments (page 4) misconstrue a statement in the ATA Opening Comments (pages 4-5) that only carriers (not carriers and shippers) may enter into an agreement under Section 13703(a)(1) as if the ATA statement implied that only carriers and not shippers receive the benefit of antitrust immunity under Section 13703(a)(6). The TCPC has confused who may enter into an agreement under Section 13703 (only carriers) with who receives antitrust protection under Section 13703 (any person with respect to the making or carrying out of an agreement approved under Section 13703, and a shipper can be such a person "carrying out").

point. The issue is not what the statute says -- the issue is whether the Board's decisions in this proceeding comply with what the statute says. Any action by the Board with regard to the NCC Agreement based in whole or in part on the Board's judgment of whether the NCC Agreement merits antitrust immunity does not comply with the statute. As our Opening Comments in this proceeding stated, under Section 13703 antitrust immunity is not the object of the Board's determination -- it is the statutory result of the Board's determination.

II. The Board Must Apply the Law in Force at the Time of the Board's Decision, Including the Strong Presumption for Continuation of the NCC Agreement

The TCPC states in its Reply Comments (page 3) that the Board should apply in this proceeding the law as it was in force under former Section 13703(c) of Title 49 of the U.S. Code. That subsection has been amended by Section 227 of the Motor Carrier Safety Improvement Act of 1999 (Public Law 106-159, December 9, 1999)("MCSIA"). The law that the Board must apply in making its decision in this proceeding is the law in force at the time of the Board's decision -- that is, the current text of Section 13703 and not the previous text of Section 13703. Moreover, the law currently in force creates a strong presumption of continuation of the Board's approval of the NCC Agreement, so the burden of persuasion for changes to the Agreement falls on those who seek such changes.

The MCSIA states (Sec. 107) that "[t]his Act shall take effect on the date of enactment of this Act . . .." Accordingly, the amendments to Section 13703 of Title 49 made by Section 227 of MCSIA took effect on the date of MCSIA's enactment: December 9, 1999. Although Section 13703(e)(2), as enacted by Section 227 of the MCSIA, states that "[n]othing in section 227 . . . including the amendments made by such section, shall be construed to affect any case brought

under this section that is pending before the Board as of the date of the enactment . . . .," Section 13703(e)(2) does not apply in this proceeding, for two reasons. First, this proceeding was initiated after the December 9, 1999 enactment of MCSIA, on February 4, 2000, and thus was not "pending before the Board as of the date of the enactment . . . .". 2000 WL 15963. Second, this proceeding is not a case, and the provision applies only to a "case."[4] Thus, with regard to whether the former text or current text of Section 13703 applies in this proceeding, MCSIA's only guidance is the statement in Section 107 that MCSIA and the amendments made by MCSIA take effect on the date of MCSIA's enactment. In these circumstances, the law that the Board must apply in making its final decision in this proceeding is the law in force at the time the final decision in the proceeding is rendered. *See* Landgraf v. USI Film Products, 511 U.S. 255, 280 (1994)(". . . [W]e understand the instruction that the provisions are to 'take effect upon enactment' to mean that courts should evaluate each provision of the Act in light of ordinary judicial principles concerning the application of new rules to pending cases and preenactment conduct."); Bradley v. School Board of City of Richmond, 416 U.S. 696, 711 (1974)("We anchor our holding in this case on the principle that a court is to apply the law in effect at the time it

[4] Note especially that Congress used the word "proceeding" in regard to review of previously-approved agreements in §13703(c) as distinguished from the word "case" in §13703(e)(2), which makes clear that a proceeding to review a previously-approved agreement is not a "case." Congress acted reasonably in providing that the new version of Section 13703 as amended by MCSIA does not apply in a "case" pending before the Board on the date of MCSIA's enactment, while it does apply in other proceedings pending before the Board on that date, such as this proceeding relating to the NCC Agreement. If Congress had allowed Section 13703 to apply to a "case" pending before the Board -- for example, adjudication of a dispute over a particular classification item in a Board investigation under Section 13703(a)(5) -- Congress would have risked impairing rights that a party possessed at the time the party acted, risked increasing a party's liability for past conduct, or risked imposing new duties with respect to transactions already completed. Those risks are not present in non-"case" matters -- such as this proceeding -- that deal with continuation of an agreement that will govern future conduct. This distinction between application to past conduct and application to future conduct was at the core of the Supreme Court's reasoning in establishing judicial default rules regarding the retroactive application of statutes in the absence of clear Congressional intent. Landgraf v. USI Film Products, 511 U.S. 244, 280 (1994). Note that Board rules distinguish among "cases," proceedings and other matters (*see, e.g.,* 49 CFR §1011.1(b)) and that the Board has rejected an argument that this proceeding is an investigation under Section 13703(a)(5). Surface Transportation Board, National Classification Committee -- Agreement, Section 5a Application No. 61 (Sub-No. 6), footnote 1 (Decided February 4, 2000, Service Date February 11, 2000).

renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary."); *see also* Southwestern Pennsylvania Growth Alliance v. Browner, 121 F. 3d 106, 119-121 (3d Cir. 1997); DirectTV v. Federal Communications Commission, 110 F. 3d 816, 825-26 (D.C. Cir. 1997).

For the reasons set forth above, the Board must observe, in rendering its decision in this proceeding, the version of Section 13703(c) currently in force. This is particularly important because Section 13703(c)(2) as enacted by Section 227 of the MCSIA and currently in force states: "Any such agreement shall be continued unless the Board determines otherwise" (emphasis added). Section 13703(c)(2) creates a strong presumption in favor of continuation of the NCC Agreement, and, as a result, the burden of persuasion in justifying any change in the NCC Agreement falls on those who wish to change the Agreement. *See* In the Matter of Penn Central Transportation Company, 384 F. Supp. 895, 918 (Special Ct., Regional Rail Reorg. Act, 1974)(statute stating that "court shall order that the reorganization be proceeded with pursuant to this Act unless it . . . finds that this Act does not provide a process which would be fair and equitable . . ." creates a presumption in favor of reorganization under the Act and places the burden of persuasion on those who seek otherwise).

Congress has tightly cabined the Board's authority to do anything other than continue the previously-approved NCC Agreement. For the Board to "decide otherwise" under Section 13703(c)(2) and thereby override the statutory presumption of continuation, the Board must determine that it is "necessary to protect the public interest."[5] 49 U.S.C. §13703(c)(1).

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[5] In enacting the MCSIA, Congress made the presumption in favor of continuation of an agreement approved by the Board even stronger than it had previously been. Under pre-MCSIA Section 13703(d), the Board was to continue an agreement previously approved by the Board "unless it finds that the renewal is not in the public interest." In the post-MCSIA Section 13703(c), Congress has strengthened the presumption in favor of continuation of an already-approved agreement, by providing for its continuation unless the Board finds that a change in the agreement is "necessary to protect the public interest."

Those who seek a Board decision other than continuation of the NCC Agreement in its current form bear a heavy burden of demonstrating that changes in the Agreement are necessary to protect the public interest. Unless the record shows that they have met such a burden -- and it does not -- the Board must follow the strong statutory presumption in favor of continuation of the NCC Agreement.

Conclusion

The American Trucking Associations, Inc. ("ATA"), for the reasons stated in its Opening Comments dated April 9, 2000 as supplemented by these Rebuttal Comments, respectfully adheres to its motion that the Surface Transportation Board terminate its search for "methodologies for increasing shipper participation in the classification process"[6] and instead continue for an additional five years the National Classification Committee (NCC) Agreement without change.

Respectfully submitted,

AMERICAN TRUCKING ASSOCIATIONS, INC.

By Its Counsel: David S. Addington June 6, 2000

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[6] Surface Transportation Board, National Classification Committee -- Agreement, Section 5a Application No. 61 (Sub-No. 6), "Summary" (Decided February 4, 2000, Service Date February 11, 2000).

CERTIFICATE OF SERVICE

I certify that I have this day served copies of this document upon all persons listed on the final revised service list in proceeding "Section 5a Application No. 61: National Classification Committee -- Agreement" by first class mail, postage pre-paid.

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June 6, 2000
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